Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIGUEL BOLIVAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should resolve a conflict among the circuit courts of appeal as to whether a "heightened scrutiny" test should be applied to the sufficiency of evidence of involvement in a criminal conspiracy to protect defendants from being found guilty by association and on speculation. The Seventh Circuit Court of Appeals, which affirmed petitioner's conviction by order, does not apply such a test. The Fourth, Fifth, and Ninth Circuits do, and with such scrutiny, the evidence against petitioner was clearly insufficient.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Miguel Bolivar prays that a writ of certiorari issue to review the judgment of the court below, affirming his conviction at a second trial, his first trial on these charges ending in a hung jury, of conspiracy to distribute cocaine with a sentence of 150 months and a five-year term of supervised release.

OPINIONS BELOW

The order of affirmance of the United States Court of Appeals for the Seventh Circuit is not published pursuant to its Circuit Rule 53, and is entitled United States of America v. Frank Diaz and Miguel Bolivar, Nos. 93-2537 and 93-2578. It is attached at App. 1-12 to this petition. The Judgment Order of the United States District Court for the Northern District of Illinois is attached at App. 13-15.

JURISDICTION

The decision and judgment of the Court of Appeals was issued on October 4, 1994. This Petition is being filed on or before February 2, 1995 pursuant to the order of Justice Stevens entered on December 13, 1994, on petitioner's application for extension of time, said application having been timely made.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fifth Amendments to the United States Constitution, which provide:

First Amendment:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

> No person shall be held to answer for a capital, be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

STATEMENT OF THE CASE

The decision below affirmed the Petitioner's conviction for conspiracy to distribute cocaine. Frank Diaz and Miguel Bolivar were accused of being members of the "Flores Organization" and were charged with conspiracy to distribute cocaine, and two substantive counts of distribution of cocaine on June 5 and June 8, 1990 and posses-

sion with intent to distribute nine kilograms on July 21, 1990. The two men were tried together. After a four-day trial, a jury convicted Diaz of the substantive June 5 and June 7, 1990 distribution counts, but could not reach a verdict concerning the conspiracy charge or the July 21, 1990 possession charge. The jury was unable to reach a verdict with respect to all charges against Petitioner. O.R. 83-86.

Petitioner was then retried with Diaz, the latter on the charges the first jury had been unable to reach a verdict on. But as to Petitioner, the government dismissed counts two and three, the June 5 and June 7 distribution counts, and the July 9, 1990 possession charge. The prosecution was able to introduce before Petitioner and Diaz's joint jury Diaz's prior drug transactions that formed the basis of his convictions at the first trial. (Proceedings, February 8, 1993, at 21-23.)

After a four-day trial, Petitioner and Diaz were convicted of conspiracy to distribute cocaine and Diaz of Count Four, possession with intent to distribute. (O.R. 109) Petitioner was sentenced to one hundred and fifty months in the custody of the Attorney General and five years of supervised release.

Petitioner's evidence at trial established that on July 7, 1990, he was returning from Calumet City, Illinois, where he had gone to see about buying a restaurant. (Hearing on motion to suppress, pp. 135-36) Bolivar was in the restaurant business and had recently sold a restaurant called "El Sombrero" in Mount Prospect, Illinois. He had $26,900 in cash and a $1000 cashier's check from the sale of his restaurant. Returning from Calumet City, located in the far south side of Chicago, he stopped at the El Parral tavern at 87th and Commercial on Chicago's

South Side. (Motion, p. 136) A few moments later, Angel Flores, an old friend of Bolivar's from prison, arrived. (Motion, pp. 38, 139) Flores, Bolivar and a man Bolivar had never met before, Jose Luis Temores, left for breakfast. (Motion, p. 139)

After breakfast, the three returned to the tavern. Bolivar's car was having ignition problems and Temores lent Bolivar his Oldsmobile Tornado so he could get back home. (Motion, p. 141)

On taking the Tornado, Bolivar drove it to his car, removed his briefcase from his car and placed it in the trunk of the Tornado. (Motion, pp. 131-32) Petitioner then began driving home. At Kedzie and Fullerton, on Chicago's Near North Side, Petitioner was stopped for "investigation" by five DEA surveillance vehicles. (Motion, p. 70) While Petitioner was outside the Tornado, an agent removed the keys and opened the trunk. The entire inside of the car was searched. Petitioner told the agents the car belonged to a "Jose Luis". He did not remember the last name. (Motion, p. 66) Petitioner told the agents that the briefcase in the trunk had $26,000 in it from the sale of a restaurant. (Motion, pp. 67-8) When it was opened with Petitioner's consent at the DEA's Chicago offices, it had $26,900 in cash, a cashier's check for $1,000.00 and miscellaneous paperwork belonging to Petitioner. (Motion, p. 74) Petitioner told the agents he was aware of no drugs in the Tornado and this was borne out by physical search and the use of a dog. (Motion, pp. 76-7, 126) Petitioner was then dropped at a hotel. (Motion, p. 81) The DEA kept the car and the money.

The Seventh Circuit's order of affirmance confronts Petitioner's attack on the sufficiency of the evidence to support his conspiracy conviction as follows:

"Both defendants claim that the evidence was insufficient to support their Count 1 conspiracy convictions.

There is ample evidence of Diaz's involvement in the drug conspiracy. The evidence proved that he delivered cocaine on two occasions. He had numerous conversations with co-conspirators Temores and Silva over a three-month period discussing drug deals in coded language. He sold two ounces of cocaine under the supervision of Flores to a CI on June 5, 1990. This took place in a Walgreen drugstore that was also the location for Flores and Temores during a subsequent drug transaction. In sum, the evidence showed that Diaz had frequent conversations with conspirators, discussed drug activities, and engaged in drug deals at the El Parral Tavern. The jury could therefore find that he was a member of the conspiracy.

The evidence is also sufficient to establish Bolivar's membership in the conspiracy. A CI advised DEA agents that he knew someone associated with the El Parral Tavern who was interested in purchasing kilogram quantities of cocaine. The CI thereafter arranged to sell Bolivar multiple cocaine kilograms. He had numerous conversations with the CI and negotiated a price and inspected the cocaine being offered for sale. The evidence also established that Bolivar appeared for a drug transaction with Flores and Temores in July 1990. Prior to the transaction, Temores indicated that Bolivar cut Temores' cocaine for street-level distribution. Moreover, Bolivar's conduct during and after that encounter indicate [sic] he was a knowing member of the drug conspiracy. For example, Bolivar was given the use of a drug-load car and made phone calls after being stopped to Flores and Temores to warn them that the DEA had seized the car and the $26,000. In addition, Flores and Temores discussed Bolivar's detention by police and remarked that he would not be working for the Flores organ-

> ization for a while since he might have agreed to cooperate with the authorities.
>
> When considered in the light most favorable to the government, the evidence was clearly sufficient for the jury to find that Bolivar and Diaz were participants in a conspiracy to possess cocaine with intent to distribute it." (Order, page 6)

Apart from the foregoing, the government suggested that the key evidence supporting Petitioner's involvement in a drug conspiracy was that Bolivar was approached by a paid informant in March of 1990, who tried, unsuccessfully, to sell Petitioner several kilograms of cocaine. The meeting between the informant and Petitioner did not take place at the El Parral Tavern. (Transcript of October 27, 1992, p. 133). And the date—March 1990—was outside the time frame the government contended Petitioner was a member of the conspiracy.

The only probative evidence was that Petitioner was at the El Parral the morning of July 7, he previously knew Angel Flores and had breakfast with him and Jose Luis Temores who he had never met before, he borrowed a car because his would not start, he had a briefcase with $27,000 in it, there were no drugs in the car or on him, the money was explained as the proceeds of the sale of his restaurant and he had been about to buy a business that day, and a government agent testified that $27,000 was not enough money for a narcotics buy within the scope of the Flores conspiracy.

REASONS FOR GRANTING THE WRIT

CERTIORARI WOULD BE GRANTED TO DETERMINE WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS SHOULD BE APPLYING THAT "HEIGHTENED SCRUTINY" OF EVIDENCE IN CONSPIRACY CASES THAT THE FOURTH, FIFTH, AND NINTH CIRCUITS HAVE HELD NECESSARY TO PROTECT INDIVIDUALS FROM CONVICTIONS BASED ON SPECULATIONS AND ON THEIR ASSOCIATIONS WITH OTHERS.

It goes without saying that criminal convictions must be based on facts, not conjecture. *United States v. Sullivan*, 903 F.2d 1093 (7th Cir. 1990). The elements of the crime of conspiracy appear simple: (1) an agreement between two or more persons (not including government agents), (2) to commit in concert an unlawful act, here to violate the narcotics laws. *Morrison v. California*, 291 U.S. 82, 92 (1934). The question here is whether the evidence the evidence was sufficient to prove that Petitioner agreed with another in the charged conspiracy to commit an unlawful act. The answer is also simple: no.

Examination of the government's brief in the Seventh Circuit reveals nothing about Petitioner within the time frame of the charged conspiracy except on July 7 (the day of his arrest), and July 9. The March 1990 unconsummated purchase was not part of the indictment or the conspiracy.

In conspiracy cases, especially where, as here, it is the only count the government sought to retry Petitioner on (at a joint trial with a co-defendant whom the trial court permitted the government to introduce evidence of his conduct resulting in convictions at the first trial of the two men), the Seventh Circuit, unlike other circuits, has refused to view with "heightened vigilance" the "slippery facts and the speculations necessary to uphold [the conspiracy] conviction there at issue." *United States v. Giunta*,

925 F.2d 758, 765 (4th Cir. 1991), *quoting with approval*, Judge Goldberg in *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978). The Fourth Circuit proclaims: "Heightened vigilance to guard against the increased risks of speculation, though not a heightened standard, is warranted in conspiracy prosecutions." *Id.* at 766.

Here, as stated in *Giunta*, and in the Ninth Circuit's opinion in *United States v. Melchor-Lopez*, 627 F.2d 886, 892 (1980), "[t]he law requires more than a conspiracy to attempt to arrange a purchase. . . ."

Petitioner's conviction is exactly what Justice Jackson warned of in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949):

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition there, suggests the loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

The Fourth, Fifth, Eighth and Ninth Circuits have been requiring a greater scrutiny of facts in conspiracy prosecutions than the Seventh. The Fifth Circuit has repeatedly stated its concern over the potential of conspiracy for suggesting guilt by association. *United States v. Skillern*, 947 F.2d 1268, 1274 (5th Cir. 1991) (conspiracy conviction reversed). It "will not lightly infer a defendant's knowledge of and participation in a conspiracy." *United States v. Maltos*, 985 F.2d 743, 746 (5th Cir. 1992) (conspiracy conviction reversed).

In *Giunta* the Fourth Circuit took note of the fact that though the defendant was a "reprehensible person," and that he had taken steps to facilitate another to arrange to buy drugs, that was not criminal and not conspiracy.

And here, Petitioner's unrelated bartering with a paid informant to purchase some drugs without culmination is not a conspiracy or part of the one charged.

Petitioner's association with Angel Flores, a drug trafficker, and his borrowing a car, and his calling back to tell of his arrest, is not enough, without more, to demonstrate guilt of advancing a conspiracy. *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988), relying on *United States v. Blessing*, 727 F.2d 353 (5th Cir. 1984), *cert. denied sub nom., Rodriguez v. United States*, 469 U.S. 1105 (1985) and *United States v. Gardea-Carrasco*, 830 F.2d 41 (5th Cir. 1987). While circumstantial evidence can be the sole basis for a conspiracy conviction, reversal in cases such Petitioner's, under "heightened scrutiny" will not create an impossible task for the prosecution. See *United States v. Caro*, 569 F.2d 411, 420 (5th Cir. 1978).

While the Seventh Circuit has on occasion stated that the government must establish that the defendant's relationship with the other conspirators "was more than a mere association," (*United States v. Sullivan*, 903 F.2d 1093, 1098-99 (7th Cir. 1990)), it has not looked with jaundiced eye on conspiracy charges. Moreover, knowledge of the presence of drugs is not enough to prove involvement in a drug conspiracy. *United States v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991). The result of this is that by accident of location, a defendant charged with conspiracy stands a far higher chance of his conviction being affirmed in the Seventh Circuit than in the Fourth, Fifth or Ninth.

This court should grant certiorari to examine in detail the pervasive use of "slippery evidence" in drug conspiracy prosecutions, and to halt the practice, especially in cases as this one, in which Petitioner was never connected to, was never present with, any drugs in the conspiracy.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

App. 1

[Unpublished Order Not To
Be Cited Per Circuit Rule 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604 .

Argued June 9, 1994

October 4, 1994

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

Nos. 93-2537 and 93-2578

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

FRANK DIAZ and MIGUEL BOLIVAR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 527—**Hubert L. Will,** *Judge.*

ORDER

In September 1991 defendants Frank Diaz and Miguel Bolivar and four others[1] were named in a four-count

[1] The remaining named defendants were Angel Flores, Jose Temores, Jose Juarez and Antonio Amaya.

superseding indictment. Count 1 charged the defendants with a conspiracy to possess with intent to distribute cocaine from April 1990 through September 13, 1990, in violation of 21 U.S.C. § 846. Count 2 charged them with distributing 56.68 grams of cocaine on June 5, 1990, in violation of 21 U.S.C. § 841(a)(1). Count 3 charged them with distributing 28.01 grams of cocaine on June 8, 1990, in violation of 21 U.S.C. § 841(a)(1). Count 4 charged them with intent to distribute approximately nine kilograms of cocaine on July 21, 1990, in violation of 21 U.S.C. § 841(a)(1).

Diaz and Bolivar were tried together. On November 5, 1992, the jury found Diaz guilty of Counts 2 and 3. The jury, however, was unable to reach a verdict on Counts 1 or 4 as to Diaz or on any count as to Bolivar. On February 16, 1993, after a second jury trial, Diaz was convicted of Counts 1 and 4 and Bolivar was convicted of Count 1.

On May 26, 1993, Diaz was sentenced to 108 months' imprisonment and four years' supervised release on each of the four counts, the sentences to run concurrently. On June 10, 1993, Bolivar was sentenced to 150 months' imprisonment on Count 1, but the sentence was amended on July 2, 1993, by adding a five-year term of supervised release to follow his imprisonment.

Facts

In 1989 the Drug Enforcement Administration (DEA) started investigating Angel Flores' drug organization, which operated mainly from the El Parral Tavern at 8701 Commercial Avenue in Chicago. The Flores organization consisted of the six defendants named in the superseding indictment plus Arturo Silva and others unknown to the grand jury.

In March 1990 a confidential informant (CI) advised DEA agents that defendant Bolivar had expressed interest in purchasing cocaine in kilogram quantities. Subsequently DEA agents arranged for the CI to meet with Bolivar on several occasions to set up a "reverse buy" drug transaction, with DEA agents posing as cocaine suppliers. From March 1 through March 14, 1990, the CI conferred with Bolivar to arrange for the sale of cocaine. Bolivar became suspicious of the CI and therefore terminated discussions. The district court subsequently authorized DEA agents to intercept telephone conversations to and from Flores' El Parral Tavern. The authorization was for four months.

Diaz Evidence

Based on conversations intercepted on the morning of May 25, 1990, and on surveillance of the El Parral Tavern, DEA agents discovered that Diaz was a street-level distributor of cocaine working for the Flores organization. The agents overheard Diaz ask co-conspirators Arturo Silva and Jose Temores about an anticipated delivery of cocaine. The next day Diaz again asked Temores about the delivery of the cocaine. A few days later Diaz placed another call to Temores. In this conversation Diaz referred to Temores as "boss" and explained to Temores that he had not showed up at a planned drug deal because he did not have all the money needed.

The DEA agents thereafter used a second confidential informant (C12) to arrange a purchase of cocaine from Diaz. On June 4 Diaz agreed to sell C12 three ounces of cocaine for $1,100 per ounce. This agreement came one day after a telephone call between Diaz and Temores wherein Temores told Diaz that the cocaine would be

ready for delivery the following Tuesday or Wednesday. A code name was used to talk about the cocaine. On June 5, Diaz delivered two ounces of cocaine to C12. Immediately before the delivery Diaz met with co-conspirator Flores.

On June 6, 1990, C12 contacted Diaz to purchase another ounce of cocaine, but Diaz advised him that he could not get the cocaine that day. Later that evening in an intercepted telephone call Temores and Diaz discussed the delivery of cocaine. Code words were again used in this conversation.

On June 7 C12 attempted to contact Diaz about purchasing an additional ounce of cocaine. He was advised by co-conspirator Arturo Silva that Diaz was ready to oblige, and on the following day Diaz sold C12 another ounce of cocaine for $1,100. Diaz had obtained the cocaine from his apartment. He told C12 that he could sell him another four ounces of cocaine later at a higher price.

In a subsequent conversation between C12 and Diaz, the latter stated that he had more cocaine to sell and he showed C12 the place in the basement of the La Clinica Tavern where he had hidden three ounces of cocaine.

Between July 9 and July 18, 1990, DEA agents intercepted three coded drug conversations between Diaz and Temores and between Diaz and co-conspirator Silva. During these conversations, Diaz, Temores and Silva used code words to refer to cocaine. In the July 9th conversation Diaz was asked by Temores about selling six kilograms of cocaine in Temores' possession. They also discussed how Diaz had been given cocaine on credit and that Diaz needed to collect money before more cocaine was given him on credit. That same day Diaz telephoned Temores to report that Diaz had not collected the money

from selling cocaine and that he needed two additional kilograms.

Bolivar evidence

On July 6, 1990, DEA agents intercepted a coded telephone conversation between co-conspirators Flores and Temores. This caused the agents to believe that Flores and Temores were going to meet with another person, a "professional who cuts grass [i.e., cocaine]," on July 7 between 9 and 10 A.M. to conduct a drug transaction.

On the morning of July 7, defendant Bolivar met Flores and Temores, and Flores drove all three to his south side restaurant. Afterwards the three men were driven by Flores to the El Parral Tavern. Bolivar then walked over to a green Chevrolet and opened its trunk to remove a maroon briefcase. After he returned to Flores' car, the three men drove to a nearby garage and Temores left the group. Flores and Bolivar then drove to a nearby park where Temores rejoined them, now driving a white and maroon Toronado automobile. Bolivar joined Temores in the Toronado. Flores continued in his car. The three men then went to the El Parral Tavern.

After meeting with Temores and Flores inside the El Parral Tavern, Bolivar drove the Toronado to the north side of Chicago via a circuitous route. The undercover agents following the Toronado realized that Bolivar had recognized their surveillance and decided to stop him. They did not place him under arrest because they did not wish to compromise their undercover investigation. After stopping Bolivar the agents asked him about his possession of the Toronado and the maroon briefcase. Bolivar stated that the briefcase was his and that inside it was money from the sale of a restaurant. Bolivar also stated

that he borrowed the Toronado from a Jose Luis. Bolivar then agreed to accompany the agents to their office for further questioning and the inspection of the Toronado and the briefcase.

The inspection of the Toronado revealed that it was an illegal drug "load car" containing secret compartments. It was registered to co-conspirator Silva with the listed address being the El Parral Tavern. The briefcase contained $26,000 in cash, a $1,000 cashier's check payable to Bolivar, and miscellaneous documents that he claimed related to the sale/purchase of a restaurant. The agents also discovered a key to a room in an Oak Lawn, Illinois, Holiday Inn. The key was discovered when Bolivar attempted to discard it en route to the DEA office. Bolivar stated that he had rented the room for himself and two women. During the questioning of Bolivar, he received a call on his beeper from Flores' residence.

After their interview with Bolivar at the DEA office, the agents seized the Toronado and the $26,000 in cash. They then drove Bolivar to the Oak Lawn Holiday Inn. The search of the room revealed two men's toilet article kits, men's clothing and a checkbook in the name of Pedro Chavez of El Paso, Texas. There was no evidence that women had been in the hotel room as Bolivar claimed. The agents then left Bolivar at the Holiday Inn.

Later that evening the DEA agents intercepted a telephone call between Mrs. Temores and her husband, who was at the El Parral Tavern. This conversation revealed that Bolivar had called the Temores residence to speak to Temores and that Bolivar had asked Mrs. Temores to tell her husband to call him. Later that evening in an incoming call from Bolivar to the private line at the El Parral Tavern, Bolivar asked Temores about the ownership

of the Toronado. Bolivar then told Temores to call him from a public phone. Thereafter DEA agents intercepted several calls between Flores and Temores discussing Bolivar's stop and questioning. In the next two days, Bolivar attempted to contact Temores as revealed in several intercepted calls.

On July 9, Bolivar called Temores at the public phone inside the El Parral Tavern. Bolivar discussed his stop by DEA agents on July 7. He advised Temores that the Toronado and money had been seized. Bolivar said the Toronado was now parked in the federal garage but that there was nothing in the car. He said that Flores was upset because Bolivar had not contacted Temores about the stop. Bolivar and Temores then talked in code and Bolivar asked Temores whether he was at a public phone. Bolivar told Temores that he had been followed by the police after getting into the Toronado and was unsuccessful in trying to lose them.

After this conversation between Bolivar and Temores, DEA agents intercepted another call to Flores placed by Temores from the El Parral Tavern. Temores advised Flores what Bolivar had told him about the seized Toronado. Temores then advised Flores that he told Bolivar that Bolivar could no longer work for the drug organization, at least for a while.

During his second trial, Bolivar's motion to suppress evidence was denied. The government dismissed all but the conspiracy count (Count 1) against Bolivar. After a four-day trial, Bolivar and Diaz were convicted under Count 1. Diaz was also convicted under Count 4 for possession with intent to distribute nine kilograms of cocaine seized on July 21, 1990. Diaz had been found guilty of Counts 2 and 3 at the first trial.

Analysis

Denial of Bolivar's motion to suppress evidence

With respect to his pretrial motion to suppress evidence, Bolivar argues that it was wrongly denied. He claims that the July 7, 1990, stop of the Toronado he was driving was pretextual and improper. We disagree.

Before Bolivar was stopped alone in the Toronado, the agents had intercepted a conversation between Flores and Temores on July 6 in which they discussed a meeting for July 7 between 9 and 10 A.M. with a professional who cuts cocaine. Bolivar then met with Flores and Temores at the scheduled time. The three then engaged in actions witnessed by DEA agents which were consistent with a drug transaction. Judge Will therefore determined that although the officers did not reveal their actual reasons for stopping the Toronado (and instead indicated that he was being stopped for a traffic violation), the stop was not pretextual since the officers had probable cause to take such action. We agree. The intercepted phone conversation and the actions of Temores, Flores and Bolivar gave the agents reasonable grounds to suspect that Bolivar was involved in a drug transaction. The stop of the Toronado was proper.

Bolivar also claims that the traffic stop was actually an illegal arrest. The district judge, however, concluded that Bolivar was not placed under arrest when he was stopped in the Toronado. We agree. The evidence shows that Bolivar agreed to accompany the DEA agents in their car to their office and subsequently to the Holiday Inn hotel. The evidence also shows that Bolivar signed a consent form for the search of the Toronado and had voluntarily unlocked his briefcase for the agents' inspection at their office. Therefore the district judge was warranted in hold-

ing that there was no illegal arrest or illegal search of the Toronado. Cf. *United States v. Kozinski*, 16 F.3d 795, 810 (7th Cir. 1994).[2]

The district judge also correctly concluded that even though the agents did not arrest Bolivar, they would have had probable cause to do so since they had reason to believe Bolivar and the car had been involved in a drug transaction. The denial of Bolivar's motion to suppress was clearly warranted.

Evidence supporting conspiracy conviction

Both defendants claim that the evidence was insufficient to support their Count 1 conspiracy convictions.

There is ample evidence of Diaz's involvement in the drug conspiracy. The evidence proved that he delivered cocaine on two occasions. He had numerous conversations with co-conspirators Temores and Silva over a three-month period discussing drug deals in coded language. He sold two ounces of cocaine under the supervision of Flores to a CI on June 5, 1990. This took place in a Walgreen drugstore that was also the location for Flores and Temores during a subsequent drug transaction. In sum, the evidence showed that Diaz had frequent conversations with conspirators, discussed drug activities, and engaged in drug deals at the El Parral Tavern. The jury could therefore find that he was a member of the conspiracy.

---

[2] Since Bolivar was not under arrest, *United States v. Ingrao*, 897 F.2d 860 (7th Cir. 1990), and *United States v. Novak*, 870 F.2d 1345 (7th Cir. 1989), are inapplicable. Moreover, as the district court correctly concluded, the officers would have had probable cause to effectuate an arrest if they had chosen to do so.

The evidence is also sufficient to establish Bolivar's membership in the conspiracy. A CI advised DEA agents that he knew someone associated with the El Parral Tavern who was interested in purchasing kilogram quantities of cocaine. The CI thereafter arranged to sell Bolivar multiple cocaine kilograms. He had numerous conversations with the CI and negotiated a price and inspected the cocaine being offered for sale. The evidence also established that Bolivar appeared for a drug transaction with Flores and Temores in July 1990. Prior to the transaction, Temores indicated that Bolivar cut Temores' cocaine for street-level distribution. Moreover, Bolivar's conduct during and after that encounter indicate he was a knowing member of the drug conspiracy. For example, Bolivar was given the use of a drug-load car and made phone calls after being stopped to Flores and Temores to warn them that the DEA had seized the car and the $26,000. In addition, Flores and Temores discussed Bolivar's detention by police and remarked that he would not be working for the Flores organization for a while since he might have agreed to cooperate with the authorities.

When considered in the light most favorable to the government, the evidence was clearly sufficient for the jury to find that Bolivar and Diaz were participants in a conspiracy to possess cocaine with intent to distribute it.

Calculation of the sentencing guideline range for Diaz

At the sentencing, Judge Will determined that Diaz's sentence should be based on the foreseeability of the fact that the conspiracy involved distributing at least three to four kilograms of cocaine rather than just the three ounces of cocaine he personally distributed. It is well settled that the amount of narcotics considered in sentencing for conspiracy includes not only the amounts known

to the defendant but those that were reasonably foreseeable. *United States v. Mojica*, 984 F.2d 1426, 1442 (7th Cir. 1993). This record amply supports the district judge's finding that Diaz knew or should have known that the conspiracy involved three to four kilograms of cocaine. Not only was Diaz a distributor for the Flores drug organization—a large scale organization—but taped conversations showed that he had discussed multiple-kilogram cocaine deals. In fact, in one conversation Diaz mentioned a six-kilogram transaction and in another he asked for additional kilograms amounts of cocaine. Moreover, he was still a member of the conspiracy when nine kilograms of cocaine were seized from Flores and Temores on July 21, 1990. Out of judicial caution he was sentenced to 108 months' imprisonment on the basis of only three to four kilograms. The district court's determination was not clearly erroneous.

Evidence concerning Diaz's prior drug transactions

Diaz urges that the evidence of certain drug transactions that occurred during the course of the conspiracy were not admissible in view of Rule 404(b) of the Federal Rules of Evidence. Although Rule 404(b) forbids evidence of other crimes "to prove the character of a person," it is "admissible for other purposes." Thus Rule 404(b) is inapplicable when dealing with direct evidence of a conspiracy (*United States v. Diaz*, 994 F.2d 393, 394-395 (7th Cir. 1993)) or when the evidence is intricately related to the facts of the case. *United States v. Parkin*, 917 F.2d 313, 317 (7th Cir. 1990). Therefore there was no error.

Conclusion

The convictions and sentences are affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 4, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

Nos. 93-2537 and 93-2578

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK DIAZ and MIGUEL BOLIVAR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 527—**Hubert L. Will**, *Judge*.

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v.

MIGUEL BOLIVAR
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)

Case Number: 91 CR 527-3

JOSEPH LOPEZ
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count One: after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 21- USC -846

Nature of Offense: Conspiracy to Possess with Intent to distribute Cocaine

Date Offense Concluded: June 15, 1992

Count Number(s): 1

* * * * *

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) one, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * * * *

June 10, 1993
Date of Imposition of Sentence

/s/ Hubert L. Will
Signature of Judicial Officer

Hubert L. Will/U.S. District Judge
Name & Title of Judicial Officer

Judgment—Page 2 of 3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 150 months (12 years 6 months).

* * * * *

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.

* * * * *

STATEMENT OF REASONS

* * * * *

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s): Pursuant to 18 U.S.C. §3553(b), I find that there exists a mitigating circumstance not adequately taken into account by the Sentencing Commission. In this case, the defendant's role was extremely minimal—he never actually either possessed or distributed any cocaine at all. With a statutory minimum or 120 months and a Sentencing Guidelines minimum of 360 months, it is clear that the Sentencing Guidelines fail to recognize the comparative role of the defendant in this case.